United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 5, 2001

TO : Dorothy L. Moore-Duncan, Regional Director

Region 4

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: T-Fal Corporation

Case 4-CA-29790 506-6090-3400

506-6090-4900 512-5081-7000 512-5090-2500

This Section 8(a)(1) and (4) case was submitted for advice on whether the Employer unlawfully required employees to initially submit all employment disputes to binding arbitration.

In September 2000, the Union filed a Section 8(a)(3) charge alleging that the Employer unlawfully suspended and then discharged employee Henning. The Region found merit to this allegation together with various Section 8(a)(1) allegations including an unlawful interrogation, solicitation, and an unlawful "no solicitation" rule.

In August 1999, outside the Section 10(b) period, employee Henning signed an arbitration agreement as part of the Employer's "Hourly Employee Manual." Under that agreement, Henning agreed to submit to arbitration:

"any dispute ... arising from my employment ... arbitration shall be the primary step in resolving all such disputes.... I will utilize this step prior to seeking other remedies."

The Arbitration Policy referred to in the Hourly Employee Manual further provided:

Any disputes arising during your employment involving claims of unlawful discrimination or harassment under federal or state statues (sic) shall be submitted exclusively to binding arbitration ... arbitration shall be the exclusive means of resolving any dispute ... and no other action can be brought by employees in any court or forum prior to a final determination from the arbitrator.

In January 2001, the Union amended its charge to allege that the Employer violated Sections 8(a)(1) and (4) by

requiring, as a condition of employment, that its employees abide by the above mandatory arbitration agreement.

We conclude, in agreement with the Region, that the Employer's mandatory arbitration violated Sections 8(a)(1) and (4).

Regarding the Section 8(a)(4) charge, the mandatory arbitration agreement in <u>Great Western Bank</u> covered "all civil claims ... including and not limited to ... claims under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act and any other local, state or federal law concerning employment or employment discrimination)" We decided to issue a Section 8(a)(4) complaint against this mandatory arbitration agreement, which specifically referred to arbitrating disputes cognizable under "federal law," necessarily including disputes under the Act.

We noted that the complaint in <u>Kinder-Care</u>² alleged only a Section 8(a)(1) violation and not an additional 8(a)(4) violation. However, the rule in <u>Kinder-Care</u>, stated that employees had to bring their employment-related disputes to the employer "immediately," and did not explicitly bar employees from asserting their statutory rights, even though the Board construed the rule as having such an effect. On the other hand, in <u>Great Lakes Chemical</u>, employees were required to sign a statement waiving their rights to bring any legal action against the employer as a result of their layoff or termination. The Board affirmed the conclusion of the ALJ, at 622, that the employer violated Section 8(a)(4), as well as 8(a)(1), by conditioning employment on the signing of the waiver.

Like the waiver demand in <u>Great Lakes Chemical</u>, the arbitration agreement in <u>Great Western Bank</u> explicitly required an employee not to assert federal statutory rights before using the Employer's compulsory arbitration procedure. The rule thus deterred employees from seeking to file Board charges because it first required employees to

¹ See <u>Bentley's Luggage Corp.</u>, Case 12-CA-16658, Advice Memorandum dated August 21, 1995; <u>Great Western Bank</u>, Case 12-CA-16886, Advice Memorandum dated November 7, 1995; <u>Wendy's Old Fashioned Hamburgers</u>, Case 14-CA-25948, Advice Memorandum dated June 13, 2000.

² Kinder-Care Learning Centers, 299 NLRB 1171 (1990).

³ Great Lakes Chemical Corp., 298 NLRB 615, 622 (1990).

resort to the Employer's arbitration procedure. We concluded that such an open attack on an employee's right to seek access to the Board was appropriately litigated through a Section 8(a)(4) allegation. Hence, we issued a Section 8(a)(4) complaint, even though the employee in that case was not discharged for filing a charge with the Board, because the mere maintenance of that arbitration agreement chilled access to the Board.

We reach the same result in this case. Even though Henning was not discharged for filing Board charges nor for refusing to sign this mandatory arbitration agreement, the maintenance of the above agreement violated Section 8(a)(4) and 8(a)(1) because it clearly chilled access to the Board.

B.J.K.